BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY D. MCINTOSH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,022,693
CIP CONSTRUCTION COMPANY	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant appeals the June 7, 2005 preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant, as a limited liability partner, was not eligible for benefits absent the filing of an election as required by K.S.A. 2004 Supp. 44-508(b).

ISSUES

Claimant raises the following issues from its Application For Review before the Board:

1. Whether the Judge exceed his jurisdiction in finding that Claimant was not an employee of Respondent as opposed to a partner. Claimant asserts that all elements of an employer/employee relationship were established and that the alleged partnership was a sham intended only to avoid Respondent's statutory obligation to provide workers' compensation coverage to his employees.

2. Whether the Judge exceeded his jurisdiction in finding that the Kansas Workers' Compensation Act applies [sic] in this case.[1]

[1] Claimant's Application For Review at 1-2 (filed June 9, 2005).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working as a carpenter for respondent on or about August 28, 2002, at which time he signed a Partnership Agreement[2] which specifies that claimant is a non-voting 5 percent member of the partnership, with the managing partner having the authority to make the decisions for the partnership and to manage the partnership. This Partnership Agreement was never amended or modified in any fashion by either party. Claimant acknowledged reading and understanding the agreement and comprehending that he was agreeing to a partnership agreement rather than an employment relationship. At the preliminary hearing, however, claimant testified that he considered himself to be an employee of respondent.

As part of the agreement, claimant was paid $20 per hour for the work performed, with no additional benefits and no taxes of any kind deducted by respondent. The agreement also provided the opportunity to accept workers compensation insurance or to "opt out" of workers compensation. On the agreement, claimant acknowledged he marked that it was his intention to opt out of workers compensation, with the agreement specifying that claimant was to be responsible for his own workers compensation insurance. Respondent's managing partner, Merle Lemmon, testified that the $20 per hour paid to claimant was higher than he normally would have paid to an employee and took into account the lack of workers compensation insurance and the lack of tax deductions normally paid by an employer in an employer-employee relationship.

Claimant testified that the employer-respondent provided the heavy tools, including power saws and nail guns, although claimant acknowledged at times he used his own nail gun. Claimant was supplied the lighter tools, such as hammers. Respondent decided what jobs to perform and when they would start and, according to the record, respondent had the power to hire and fire the workers. Claimant's Exhibit 3[3] contains a list of partners employed in this manner. Including the employer and his wife, there are nineteen names listed as partners, with all persons on the list electing to be excluded from workers compensation coverage. Respondent's owner, Merle Lemmon, acknowledged that with the number of "partners" on that list, he and his wife would own 50 percent or less of the overall business, even though he was the managing partner.

Claimant testified that he never saw any partnership books nor was he included in any additional profits from the partnership. Mr. Lemmon testified that there were no additional profits from the partnership and that his income was generally less than the $20 per hour paid to claimant. One form attached and marked Respondent's Exhibit A to

---

[2] P.H. Trans., Cl. Ex. 1.

[3] P.H. Trans., Cl. Ex. 3.

the preliminary hearing showed, on IRS Schedule K-1 (Form 1055),[4] that claimant had an $18 loss in income from his trade or business for the year 2002. There is no other indication in this record that claimant listed any additional work losses on his income tax forms.

On January 4, 2005, claimant suffered an injury when he fell. Workers compensation benefits were initially paid, but later the insurance company determined that payment was inappropriate and the benefits were stopped. The ALJ found that the written partnership agreement was strong evidence of the partnership and that no election to be covered was filed with the Kansas Workers Compensation Division, as required by K.S.A. 2004 Supp. 44-508(b).

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[5]

There is no dispute in this matter that claimant suffered accidental injury on January 4, 2005, while performing carpentry work for respondent. The question to be determined is whether claimant was an employee or a partner of a limited liability partnership as indicated in Claimant's Exhibit 1.[6]

The Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions and protections.[7]

The primary test used to determine whether the employer-employee relationship exists is whether the employer has the right to control and supervise the worker and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished.[8] Other factors which are significant are the right to discharge the worker, payment by time rather than completed project, and the furnishing of tools or equipment.[9]

---

[4] P.H. Trans., Resp. Ex. A.

[5] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[6] P.H. Trans., Cl. Ex. 1.

[7] K.S.A. 44-501(g).

[8] *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991).

[9] *McCarty v. Great Bend Board of Education*, 195 Kan. 310, 403 P.2d 956 (1965).

K.S.A. 2004 Supp. 44-508(b) defines "workman," "employee" or "worker" as,

> . . . any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. . . . **Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a, and amendments thereto, such terms shall not include individual employers, limited liability company members, partners or self-employed persons.** (Emphasis added).[10]

In this instance, claimant acknowledges that no such election was filed.

The Kansas Court of Appeals, in *Marley,*[11] was asked to consider whether an over-the-road trucker, who owned his own tractor and entered into a relationship with the respondent, was an employee or an independent contractor. The Court of Appeals, in *Marley*, in reversing the Workers Compensation Board, found that the claimant was estopped from denying his independent contractor status. The claimant had availed himself of "Carrier's Truckers Occupational Accident Insurance" and had accepted benefits under that insurance policy. The claimant then, after receiving those benefits, attempted to denounce that insurance as being illegal and applied for workers compensation benefits. The Court of Appeals, in *Marley*, found the claimant was estopped from denying he was an independent contractor after receiving benefits under the Carrier's Truckers Occupational Accident Insurance policy for which he declared himself to be an independent contractor.

The Court, in *Marley*, stated,

> We do not believe that it should be permissible for a claimant in a workers compensation action to change his or her position to claim he or she was an employee of the respondent at the time of the injury where the claimant has previously taken advantage of his or her representation that he or she is an independent contractor and not an employee. The law does not permit such an inconsistency in positions, and the doctrine of equitable estoppel may be employed to enforce this concept.[12]

In this instance, claimant accepted additional benefits in the form of $20 per hour which both claimant and respondent's representative, Mr. Lemmon, acknowledged was

---

[10] K.S.A. 2004 Supp. 44-508(b).

[11] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

[12] *Marley* at 505.

higher than claimant would have been paid had he been an employee. Claimant acknowledged that as a result of their agreement, his take-home pay was higher than it would have been had he been an employee.

"[T]he relationship of contracting parties depends on *all* the operative facts; the label which they choose to employ is only one of those facts."[13]

In this instance, the Board finds that claimant is bound by his agreement with respondent, holding himself out as a limited liability partner for the purposes of the Kansas Workers Compensation Act. As no election was filed, as is required by K.S.A. 2004 Supp. 44-508(b), claimant does not come under the jurisdiction of the Workers Compensation Act and is not entitled to benefits therefrom. The Board, therefore, finds the Order of the ALJ denying claimant benefits should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Kenneth J. Hursh dated June 7, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2005.

BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Steven J. Quinn, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[13] *Marley* at 505, *quoting Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).